NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOMDETH PISA, Petitioner - Appellant, v. LESLIE R. BLANKS; WILLIAM LOCKYER, Respondents - Appellees.	No. 05-55625 D.C. No. CV-03-00381-LAB/JMA MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted June 9, 2006
Pasadena, California

Before: REINHARDT, TROTT, and WARDLAW, Circuit Judges.

Somdeth Pisa appeals the district court's denial of his petition for writ of habeas corpus, which alleges ineffective assistance of counsel and prejudicial erroneous jury instructions. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Pisa's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. We will grant habeas relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

The decision of the California Court of Appeal rejecting Pisa's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Even if trial counsel was deficient in failing to communicate adequately with Pisa, *see Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998); *United States v. Tucker*, 716 F.2d 576, 581-82 (9th Cir. 1983), or in failing to investigate potential witnesses, *see Strickland*, 466 U.S. at 690-91; *Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir. 1994), Pisa fails to show a "reasonable probability" that the result of his trial would have been different if counsel had investigated and presented to the jury the testimony of the four

proposed witnesses and raised the issue of the victim's blood alcohol level.[1] *Strickland*, 466 U.S. at 694. In the face of the victim's detailed, consistent testimony, given both on direct and on cross-examination, which was also consistent with both her physical condition and the treating physician's testimony, our confidence in the outcome of the trial is not undermined by the proposed additional evidence, which was properly characterized by the Court of Appeal as "speculation," "superfluous," and "not relevant." None of the proposed witnesses saw the victim sustain her injuries, so none could state convincingly that her injuries were not inflicted by Pisa. The jury heard testimony that the victim was intoxicated, so the victim's blood alcohol level and the proposed witnesses' testimony about the victim's drinking that evening were duplicative of facts already presented to the jury. As to Pisa's claim that evidence of the victim's belligerence could have supported the defense's theory that the victim had been

[1] Pisa defended at trial with the factual contention that the victim's injuries stemmed from a bar fight in which she was "falling down all over the place." At trial, the victim's treating physician testified that the victim's injuries were caused by trauma to the orbit, which required "force directly to the globe or to the eyeball itself" inconsistent with falling down. On cross-examination, the treating physician speculated that other types of force such as falling on the edge of a table that "could strike the eyeball specifically" could cause such an injury. It was not until Pisa's new trial motion, after the physician had made this comment, that the Daraphath declaration was submitted indicating that the victim "had fallen, striking her face on a nightstand next to the bed."

injured in a bar fight, that theory was presented to the jury, and the jury rejected it. Therefore, there was no prejudice.

The state court also properly concluded that the trial court's omission of the domestic violence element in its jury instruction on the charge of violation of section 12022.7(d) of the California Penal Code (redesignated in 2000 as subdivision (e)) was harmless error. *See Neder v. United States*, 527 U.S. 1, 8-16 (1999); *see also United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197-98 (9th Cir. 2000). The record developed at trial established beyond question that the offenses involved acts of domestic violence. Indeed, there was no dispute as to whether the circumstances involved domestic violence. Because "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction [was] properly found to be harmless." *Neder*, 527 U.S. at 17. Pisa's claim that the element was not uncontested, because there was a dispute over whether Pisa and the victim were still dating at the time of the incident, misinterprets the definition of "domestic violence." Under California law, and as the jury was instructed, domestic violence occurs in circumstances where the perpetrator "has had" a dating relationship with the victim, whether or not that relationship is ongoing at the time of the violence. *See* Cal. Penal Code § 13700(b). There was no question that Pisa

and the victim had been dating prior to the incident. Therefore, the instructional error could not have had any effect, much less a "substantial and injurious effect," in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted).

AFFIRMED.